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No. 90-278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARILYN A. STRONG,

Petitioner,

VS.

BOARD OF EDUCATION OF UNIONDALE UNION FREE SCHOOL DISTRICT, ALAN G. HERNANDEZ, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Did the District Court and Court of Appeals properly determine that after a teacher voluntarily removes herself from her duties for four months on account of illness, a school district's request for the medical records relating to the teacher's recent illness did not violate the teacher's right to privacy?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW . . . i

TABLE OF AUTHORITIES. iii

COUNTERSTATEMENT OF THE CASE. . . . 1

FACTUAL STATEMENT OF THE CASE . . . 4

REASONS FOR DENYING THE WRIT. . . . 19

I. THE DECISION BELOW IS CONSISTENT WITH PRIOR SUPREME COURT AND COURT OF APPEALS DECISIONS. 19

CONCLUSION. 27

TABLE OF AUTHORITIES

Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 812 F.2d 105 (3d Cir. 1987). 23

General Motors Corp. v. Director of the National Institute for Occupational Safety and Health, 635 F.2d 163 (6th Cir. 1980), cert. denied, 454 U.S. 877, 102 S.Ct. 357 (1981) 23-24

Gutierrez v. Lynch, 826 F.2d 1534 (6th Cir. 1987). . . .18,21-23

United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980), cert. denied, 453 U.S. 913, 101 S.Ct. 3148 (1981) 24

Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1977). 19-21,22

United States Constitution
Fourteenth Amendment 13,14,15

STATUTES

New York Education Law §913. . .16

RULES

F.R. Civ. P. Rule 12(b)(6) . . .16

COUNTERSTATEMENT OF THE CASE

In or about May of 1988, the petitioner, a tenured school teacher employed by the Uniondale Union Free School District, voluntarily absented herself from her teaching duties on account of illness for the remainder of the school year. When petitioner sought to return to her duties in September, respondents requested that she undergo a physical examination by the school physician. Petitioner was also directed to produce her medical records relating to her most recent illnesses which caused her absences. Petitioner refused to produce the records and filed a complaint alleging, inter alia, that the respondents' request for her records violated her constitutional right to privacy.

Respondents moved to dismiss the complaint. Upon consent of the parties, the motion was converted by the Court into a motion for summary judgment. The District Court then granted respondents' motion and dismissed the complaint. On appeal, the United States Court of Appeals, in a published opinion,[1/] affirmed the District Court's decision. The Court of Appeals noted that in light of the School District's "strong interest in protecting the children under its care . . . [respondent's]

1/ The petition erroneously asserts that "[t]he opinion of the Court of Appeals (App. B., infra, p. 4a-5a) is not reported." (Petition, p. 1) Not only is the Court of Appeals' decision officially reported at 902 F.2d 208 (2d Cir. 1990), but the petition only refers to the judgment of the Court of Appeals (Appendix B, pp. 4a-5a) and, does not, in violation of Rule 14.1(k) of this Court's rules attach the decision of the Circuit Court.

request for Strong's medical records, limited to the period of her absence from school, was reasonably tailored in scope and does not violate her privacy rights." 902 F.2d at 212-13. Petitioner seeks permission from this Court to review that portion of the Court of Appeals' holding.

FACTUAL STATEMENT OF THE CASE

The petitioner, Marilyn Strong, has been employed as a teacher by the respondent District since 1980. On May 17, 1988, petitioner did not report to work on account of illness. For the remainder of the school year the District was informed that petitioner was unable to perform her teaching duties because of her illness(es).

Petitioner was absent for over three weeks before the District received any indication of the nature of her condition and this was provided only after a letter dated June 1, 1988 was sent to her requesting that she provide in writing, the nature, prognosis, etc., of her illness. On June 8, 1988 the District's Personnel Administrator received a note from Dr. Aubrey O. Lewis

which stated that "Marilyn Strong has been treated by me and under my care for severe nosebleed, vertigo, arthritis, from May 16, 1988 to further notice [and] this patient may return to work after treatment and evaluation."

Thereafter, the District made a number of attempts to speak to petitioner directly. For example, on or about June 9, Ms. Sandra Grey, the Assistant Principal in petitioner's elementary school called petitioner at home to inquire about the status of certain academic awards for students. Petitioner indicated that she was "very sick" and hung up the phone. Throughout the summer, the District was unable to contact petitioner. Certified mail addressed to her was returned to the District and her mother refused to

provide the District with an address where she could be located.

On July 5, 1988 the District received an insurance form, signed by petitioner, indicating that she had seen at least three doctors for illnesses such as "back pain, arthritis, cold, fever, severe nosebleeds, vertigo, severe headaches and migraines." Petitioner also signed an authorization allowing "any physician" to provide information about her health or medical history to the Credit Life Insurance Company in order for her premiums to be waived. In the first week of August, Superintendent Hernandez spoke to petitioner's mother. During that telephone conversation, petitioner's mother indicated that her daughter was under doctor's orders not to contact the

District administration because it made her ill to do so.

Since the Superintendent could not contact petitioner, the District's labor counsel, Terence M. O'Neil, wrote to petitioner's attorney's office, on August 17, 1988, on behalf of the District, requesting the names of all doctors petitioner had seen since the commencement of her current illness along with releases permitting such doctors to provide the District with her medical records. These attorneys had been retained by petitioner in an action against the District. Mr. O'Neil also inquired as to whether petitioner was capable of performing any of her teaching duties in the fall. On or about August 22, 1988, Ms. Phillips, of petitioner's attorneys office, responded to Mr. O'Neil's inquiry indicating that

petitioner would return to work in September. Ms. Phillip's response, however, did not address the District's inquiry into petitioner's health and her records. Accordingly, on about August 29, 1988 Mr. O'Neil again wrote to Ms. Phillips reiterating his earlier request on behalf of the District that petitioner provide the necessary medical information to the District's physician(s). Specifically, the letter stated that

> On behalf of the Superintendent, I am again directing her . . . to provide the District with the medical information requested in my August 17 letter. This information should be provided to the District doctor . . . .
>
> Because of the uncertainty of Ms. Strong's medical condition as well as your indication that she is unable to communicate with District officials we believe she must be examined by District doctor(s) before she returns to work. In order that her condition can be properly assessed by the District

> physicians, her medical records and history must be provided to Dr. Lemonedes.

(emphasis added).

On September 6, 1988 petitioner reported to work despite having been advised that she would have to first submit to a medical examination and provide the District with her medical records. In a meeting with Superintendent Hernandez, petitioner was asked if she had spoken to her attorneys about the District's prior requests. Petitioner responded to Superintendent Hernandez that it was "none of your damn business." After petitioner was again informed that she should submit to a medical examination and provide her records, she told Superintendent Hernandez that "you can't direct me to do anything. I'll have your job for this before the school year is over."

At this encounter, Ms. Strong repeatedly pointed her finger at the Superintendent.

On September 7, 1988, respondent Hernandez wrote to petitioner summarizing their meeting of the previous day. Once again, petitioner was requested to provide the District with copies of her medical records. Copies of previous letters making such requests were also enclosed.

On the same day, petitioner, without an appointment, arrived at the office of Dr. Michael Lemonedes, the District's physician, stating that she wanted to be seen and examined. Petitioner was informed, inter alia, that more information about her condition such as her treatment, diagnoses made, etc., was necessary before the examination could be conducted. Petitioner became

argumentative when told that if she had a problem with the procedure, she should talk to Mr. Hernandez.

On or about September 8, 1988 Mr. O'Neil received a letter from Ms. Phillips which included a note from Dr. Aubrey Lewis dated September 6, 1988 stating that petitioner "has been treated and is under my care for chest pains, arthritis, palpitations, headaches, from 5/16/88 to present" but that she could return to work on September 6, 1988. The medical records of petitioner were not produced.

On September 15, 1988, Superintendent Hernandez received a letter from petitioner demanding reinstatement to her position. Petitioner claimed that she had provided the necessary medical verification

through Dr. Lewis' September 6, 1988 note.

At a meeting held on September 15, 1988 with Superintendent Hernandez, petitioner and her union representative, Joe McPartlin, were again informed that it was the normal procedure of the District to require teachers returning from lengthy sick leave to be examined by the District's physician and to provide medical records. On September 27, 1988 the District received a letter from petitioner, dated September 19, 1988, demanding that she be reinstated to her position as she was "not ill." Petitioner also stated that she was "ready to be examined by the school physician."

On October 4, 1988 Superintendent Hernandez wrote to petitioner, rejecting her demand to return to work and remind-

ing her that she had been directed to provide medical information and to make an appointment to see the District's physician. Superintendent Hernandez also informed petitioner that she could not return from sick leave until she complied with these procedures.

On November 22, 1988, the Board of Education passed a resolution pursuant to Section 913 of the New York State Education Law directing petitioner to report for a physical examination by the school physician to determine her fitness to return to work, and "to bring any and all medical records, which relate to her absence from school during the period May 16, 1988 through present, with her to the examination in order to allow the District's physician to properly evaluate the status of her health." (emphasis added).

On or about December 22, 1988, respondent Hernandez received a letter from petitioner dated December 16, 1988 in which she stated that she was willing to be examined by Dr. Lemonedes. However, she further stated, "my medical records for my illness last year are private and confidential."

In a letter dated January 5, 1989, Superintendent Hernandez informed Ms. Strong that the District's directives were not related to the physical examinations required on an annual basis for all teachers, but, rather a directive pursuant to § 913. Superintendent Hernandez again directed petitioner to contact Dr. Lemonedes and provide her medical records. To this date, petitioner has neither provided the medical records related to her illness

that started in May of 1988 nor been examined by Dr. Lemonedes.

On or about December 19, 1988, petitioner initiated this action by filing a complaint in the United States District Court for the Eastern District of New York. Petitioner alleged the respondents' request for her medical records violated her constitutional right to privacy.[2/] Respondents moved

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[2/] Petitioner also claimed that the respondents' refusal to allow her to return to her teaching position violated her due process rights under the Fourteenth Amendment of the United States Constitution. In addition, she claimed that New York Education Law §913 was unconstitutional on its face. Damages were sought against the District as well as Superintendent Hernandez in his individual capacity. Petitioner also asserted various pendent state claims. Both the District Court and Court of Appeals found no merit to these claims and accordingly, dismissed them. The petition herein, however, does not raise these issues before the Court, and accordingly, will not be addressed herein.

to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, upon consent of the parties and after each side had the opportunity to submit affidavits and other relevant material, the court converted respondents' motion to one for summary judgment. In an opinion dated September 21, 1989, the court granted respondents' motion (Appendix B, pp. 6a-14a) finding that "the request for the medical records is entirely reasonable." (A. 11a). The court reasoned that the medical records were the best evidence available concerning petitioner's medical condition. Such documents are considered to be "inherently reliable" (A. 11a) and accordingly, "constitute an exception to the hearsay rule." (Id.) Thus, the court found that respondents were

entitled to have the best information available to it.

Additionally, the District Court, while somewhat skeptical of petitioner's privacy right, found that petitioner had "substantially waived her common law privilege (A. 12). That is, by voluntarily removing herself from her teaching position, petitioner had "substantially waived her common law privilege" (A. 12).

The petitioner appealed the District Court's decision to the United States Court of Appeals for the Second Circuit. On May 2, 1990 the Court issued its published decision affirming the District Court's opinion. The court found the respondent had a "strong interest in protecting the children under its care . . . [and that] [i]ts request for Strong's medical records,

limited to the period of her absence from school, was reasonably tailored in scope and does not violate her privacy rights." 902 F.2d at 212-13. The court specifically relied on a similar case decided by the Sixth Circuit, Gutierrez v. Lynch, 826 F.2d 1534 (6th Cir. 1987), in reaching its conclusion.

REASONS FOR DENYING THE WRIT

I

THE DECISION BELOW IS CONSISTENT WITH PRIOR SUPREME COURT AND COURT OF APPEALS' DECISIONS

The Court of Appeals' conclusion that the respondent's request for petitioner's medical records was reasonable is in conformance with prior decisions of this Court, as well as various other opinions of the Courts of Appeal. Accordingly, the writ should be denied.

For example, in Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1977), the Court upheld a New York law that required physicians to identify patients for whom they had prescribed certain potentially harmful drugs. In that case, a group of patients regularly receiving

prescriptions for regulated drugs and the doctors who prescribed the drugs, argued that the patient identification provisions of the statute invaded the doctor-patient relationship and unconstitutionally interfered with the petitioners' right to privacy. The Court dismissed these claims holding that neither the immediate nor the threatened impact of the patient-identification requirements in the New York Act was sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment. 429 U.S. at 603-04, 97 S.Ct. at 878-79. In so ruling, the Court noted "the States vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control," 429 U.S. at 598, 97 S.Ct. at 876 (footnote omitted),

and that the disclosure of private medical information was often necessary:

> [D]isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosure to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

429 U.S. at 602, 97 S. Ct. at 877 (footnote omitted).

Similarly, in Gutierrez v. Lynch, 826 F.2d 1534 (6th Cir. 1987), -- a decision the Court of Appeals specifically relied on and found to be "persuasive" -- the court under similar circumstances rejected an employee's claim that his employer's request for

his medical records violated his right to privacy. In Gutierrez, the plaintiff, a former police officer, challenged a City ordinance that, inter alia, required employees on sick leave for more than 30 days to complete a form providing the City with medical information. Specifically, plaintiff claimed that the ordinance impermissibly infringed on his privacy rights. The court dismissed the claim, finding that the Supreme Court's decision in Whalen was controlling.

> Upon review of the record, we conclude that plaintiff's medical records are not protected by the constitutional right to privacy. We find this case to be indistinguishable from Whalen v. Roe. In that case the Supreme Court held that a state law that required the names and addresses of all persons who used certain drugs be supplied to the state health department did not "constitute an invasion of any right or liberty protected by the Fourteenth Amendment." Id. at

> 603-04, 97 S.Ct. at 878. The implication of that holding is that legitimate requests for medical information do not constitute an invasion of the right to privacy. In the instant case, the request for information is legitimate and does not invade plaintiff's right to privacy. Accordingly, we hold that Ordinance 82-416 does not violate plaintiff's right to privacy.

826 F.2d at 1539. See also Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 812 F.2d 105 (3d Cir. 1987) (state's powerful interests in creating an effective force against vice and narcotics justified use of detailed questionnaires which inquired into intimate facts concerning physical and mental health, and personal financial information of officers of Philadelphia Police Department); General Motors Corp. v. Director of the National Institute for Occupational Safety and Health, 636 F.2d 163 (6th Cir. 1980), cert. denied,

454 U.S. 877, 102 S.Ct. 357 (1981) (government entitled to enforcement of subpoena seeking medical records of employees; government's interests in records outweighed employee's privacy rights); United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980), cert. denied, 453 U.S. 913, 101 S.Ct. 3148 (1981) (Occupational Safety and Health Administration given unrestricted access to medical records of employer under investigation for various work place safety violations).

All of these decisions consistently recognize the strong state interest in obtaining the various records sought. The state's interests in the records are then balanced against the individual's own privacy rights.

Thus, the Court of Appeals' decision herein was in conformance with various

other decisions in this area. The Court properly determined that petitioner's rights, whatever they may be, must give way to the overriding interests of the School District in protecting the health and welfare of the school population. Indeed, notwithstanding petitioner's claims to the contrary, evidence in the form of an affidavit from the school physician was submitted specifically stating that the medical records of petitioner's most recent illnesses were necessary in order for a complete and thorough examination. Moreover, the record below is replete with evidence demonstrating that medical records and reports from other employees returning to work after a lengthy illness were requested and received by respondents. Thus, respondents' actions were not only

reasonable and prudent, but consistent as well.

CONCLUSION

The Second Circuit's holding that respondents' request for petitioner's medical records relating to her most recent illness was legitimate and reasonable is consistent with other decisions in this area. The Second Circuit's decision does not create a conflict with any other Circuit as to the standards used in balancing a public employer's need for information against the rights of an individual.

The petition, in short, should never have been brought before this Court.

Respondent prays that this Court deny the petition and decline to issue a writ of certiorari in this case.

Dated: Mineola, New York
September 12, 1990

Respectfully submitted,

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